

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>LETICIA CASTILLO</b>	)	
Claimant	)	
VS.	)	
	)	
<b>TYSON FRESH MEATS, INC.</b>	)	Docket No. 1,016,123
Respondent	)	
Self-Insured	)	

**ORDER**

Respondent appeals the February 19, 2007 preliminary hearing Order of Administrative Law Judge Brad E. Avery.

**ISSUES**

The Administrative Law Judge (ALJ), in the Order, authorized Gary L. Baker, M.D., to perform any additional testing necessary to complete his independent medical evaluation (IME). Respondent argues that the ALJ exceeded his jurisdiction and authority in this regard.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should remain in full force and effect, and the appeal of respondent should be dismissed.

This matter originally came before the Appeals Board (Board) on review of Judge Avery's December 11, 2006 preliminary hearing Order Referring Claimant For Independent Medical Evaluation. The jurisdictional dispute before the Board at that time centered around whether claimant had suffered an injury which arose out of and in the course of her employment with respondent.

A Board Member ruled that claimant had failed to prove that her carpal tunnel syndrome was directly attributable to her employment. Therefore, the ALJ had exceeded

his jurisdiction in authorizing treatment for that condition. The Board Member's Order went on to say that the ALJ did not exceed his jurisdiction in ordering an IME and "therefore, the remaining orders of the ALJ remain in full force and effect".<sup>1</sup>

Dr. Baker issued his IME report of February 8, 2007, wherein he found claimant to be suffering from several possible work-related conditions. He also recommended that claimant undergo additional testing before a specific treatment plan could be developed. The Board agrees that if the testing is for devising a treatment plan, a finding of causation is required and would be implicit in the ALJ's Order. However, even though Dr. Baker indicates that the testing is necessary before a treatment plan can be developed, it is clear that he first requires the testing for diagnostic purposes.

The study will be necessary to determine if nerve entrapment is a component of the patient's condition.<sup>2</sup>

The Order of Judge Avery dated February 19, 2007, authorizes the additional testing necessary to complete Dr. Baker's IME. The Order makes no finding regarding causation as it relates to the additional conditions identified by Dr. Baker. Additionally, the Order does not allow for any treatment to proceed. It merely allows the completion of the IME. That is the Order from which this appeal is taken.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?<sup>3</sup>

K.S.A. 44-534a grants an administrative law judge the jurisdiction to order ongoing medical treatment including referrals for IMEs if deemed necessary. In this instance, the

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<sup>1</sup> *Castillo v. Tyson Fresh Meats, Inc.*, No. 1,016,123, WL 2007 740372 (Kan. WCAB Feb. 12, 2007).

<sup>2</sup> Report of Gary L. Baker, M.D., dated February 8, 2007, at 3.

<sup>3</sup> K.S.A. 44-534a(a)(2).

report of Dr. Baker identifies more than one upper extremity condition which may be related to claimant's employment with respondent. The ALJ's Order merely allows the doctor to continue with the recommended testing. That Order is well within the ALJ's jurisdiction. The determination as to whether those additional upper extremity conditions are attributable to claimant's employment is yet to be made. Therefore, the Board does not have jurisdiction to consider the issue dealing with the recommendation for additional testing at this time, and the appeal by respondent should be dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>4</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the preliminary hearing Order of Administrative Law Judge Brad E. Avery dated February 19, 2007, remains in full force and effect and the appeal by respondent from the February 19, 2007 Order is dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April, 2007.

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BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant  
Gregory D. Worth, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge

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<sup>4</sup> K.S.A. 44-534a.